Supreme Court of the United States

OCTOBER TERM, 1941

No. 924

ARSENAL BUILDING CORPORATION
AND SPEAR & CO. INC.,

Petitioners,

AGAINST

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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ARSENAL BUILDING CORPORATION and SPEAR & CO., INC., Petitioners, *against* PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent.	No.

Come now ARSENAL BUILDING CORPORATION and SPEAR & CO., INC., your petitioners, by WALTER GORDON MERRITT, and KENNETH C. NEWMAN, their counsel, and move this Honorable Court that it shall by certiorari or other proper process directed to the Honorable the United States Circuit Court of Appeals for the Second Circuit, require said Court to certify and remove unto this Court for its review and determination, a certain cause lately pending in said Court, wherein your petitioners were defendants-appellees and Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, was plaintiff-appellant, and to that end your petitioners aforesaid now tender herewith their petition with a certified copy of the record in said cause.

WALTER GORDON MERRITT,
KENNETH C. NEWMAN,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1941

ARSENAL BUILDING CORPORATION and SPEAR & CO., INC.,
Petitioners,

against

PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Your petitioners, ARSENAL BUILDING CORPORATION and SPEAR & CO., INC., respectfully show to this Court as follows:

Parties and History of the Proceedings

1. Your petitioners are domestic corporations, organized and existing under the laws of the State of New York and maintain places of business in the City, County and State of New York. Your petitioner, Arsenal Building Corporation, is the owner of a 22 story loft building located in the City of New York and engages in no other business than the ownership and management of said building. Your petitioner, Spear & Co., Inc., is engaged solely in the management and operation of real property in the City of New York and acts as agent in managing the building owned by your petitioner, Arsenal Building Corporation.

2. The respondent is Administrator of the Wage and Hour Division, United States Department of Labor and under the provisions of the Fair Labor Standards Act of 1938, (Act of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C., Title 29, Sec. 201 *et seq.*) is charged with the administration and enforcement of said Act.

3. This suit was commenced by the respondent in the United States District Court for the Southern District of New York, on March 21, 1940, by the filing of a complaint. Thereafter and on or about March 31, 1941, an amended complaint was filed. A permanent injunction was sought enjoining and restraining your petitioners from violating Section 15 (a) (2) of said Act by continuing to employ in the Arsenal Building certain building service employees (whose duties, and the circumstances of whose employment, are more precisely set forth in the findings (paragraph 8 below, page 6)) for work weeks in excess of those prescribed in Section 7 of the Act without the payment of the specified overtime compensation.

4. A trial of this case was had before the Hon. John M. Woolsey, District Judge of the United States District Court, for the Southern District of New York, who on April 21, 1941, rendered a judgment (R. 338), embodying findings of fact and conclusions of law, dismissing the amended complaint.

5. An appeal was thereupon taken by the respondent from the decision aforesaid and the judgment entered thereon to the United States Circuit Court of Appeals for the Second Circuit (R. 339), which, on December 30, 1941, reversed the judgment of the District Court. Said reversal was based solely upon matters of law and all of the findings of fact of the District Court were permitted to stand.

The reversal was based upon the following reasons:

(a) That the employees of the Arsenal Building, were engaged in the production of goods for interstate commerce or in processes or occupations necessary to such production, within the meaning of the Act.

(b) That it was immaterial, as a matter of law, that neither of your petitioners was itself engaged in interstate commerce or in the production of goods for interstate commerce.

(c) That neither of your petitioners constitute a "service establishment the greater part of whose . . . servicing is in intrastate commerce" within the meaning of the exemption contained in Section 13 (a) (2) of the Act.

6. On January 14, 1942, the said United States Circuit Court of Appeals for the Second Circuit, entered its order staying and withholding the mandate in this case pending this application by your petitioners for a writ of certiorari to said Court.

Jurisdiction

7. Jurisdiction to review this case upon writ of certiorari before judgment is expressly conferred upon this Court by Judicial Code, Sec. 240, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C., Title 28, Sec. 347), to which Rule 39 of the Rules of this Court is applicable.

The Facts as Established by the Findings

8. No questions as to conflicting evidence or as to the weight of the evidence are involved and the facts of the case as found by the District Court (R. 326-30), and adopted by the United States Circuit Court of Appeals for the Second Circuit, are briefly as follows:

The petitioners are both New York corporations. The Arsenal Building Corporation owns a twenty-two story loft building in New York City, which, in turn, is managed by Spear & Co., Inc., as Agent.

With minor exceptions, the tenants, and their employees, in said building produce ladies' garments for interstate commerce, and purchase and sell ladies' garments in interstate commerce but there is no business relation between the tenants and either of petitioners other than that of landlord and tenant.

The sole business of the Arsenal Building Corporation is that of a real estate operation in leasing space in said building and rendering service incident thereto.

The sole activity of Spear & Co. Inc., in said building is its management and operation thereof as a loft building to be leased.

In this connection, Arsenal Building Corporation, through Spear & Co. Inc., employs about twenty-six employees to supply the ordinary type of service incident to the operation and maintenance of such a building. These employees service and maintain the building as a whole, but do not render service to the tenants, or care for the leased premises, except to operate passenger and freight elevators, and, occasionally, to enter these premises in case of leaks or fire, and to repair windows, when damage to the building as a whole is threatened. The keys of the leased premises are in the custody of the tenants and none of the employees of the Arsenal Building have access to them, or to the leased premises.

"None of the employees of Arsenal Building Corporation produces, manufactures, mines, handles, processes, or in any other manner touches, for the purpose of production, or works upon the goods produced by any of the tenants of Arsenal Building Corporation, and none of said employees transports any of said goods, except that some of said employees, as an incident to the general operation of said building, operate elevators which carry said goods of said tenants" (R. 327).

The duties of the twenty-six employees are briefly outlined.

The superintendent directs the building service employees and performs certain mechanical and maintenance work.

The building mechanic or handyman performs odd jobs around the building other than in the leased premises and assists the superintendent.

The freight elevator starter directs the five freight elevator operators in respect to their operation of four freight elevators. From time to time he relieves one of said freight elevator operators in the operation of an elevator.

One elevator starter and one assistant starter direct six operators, in the operation of the five passenger elevators and on occasion the assistant starter relieves one of the said elevator operators.

Six porters clean, polish and otherwise maintain public halls, stairways, lavatories, etc., and on occasion, as relief men, operate an elevator.

Two watchmen patrol the public places, perform some cleaning work, and on occasion operate an elevator.

Two firemen care for boilers, pumps and like equipment.

Arsenal Building Corporation buys electric current from the Consolidated Edison Company, and resells it to tenants through facilities furnished by a sub-metering company.

The building furnishes water for the public lavatories and the automatic sprinkler system, and to the tenants for

their use in their businesses. The building does not furnish hot water for the productive processes of manufacturing tenants. The landlord likewise supplies radiator heat for the leased premises.

> "In general, the duties of the building service employees of said building are limited to heating said building, keeping it in repair, protecting it from damage, cleaning the public halls, stairways, and spaces occupied by the common utilities of the building, keeping the public lavatories clean, and operating freight and passenger elevators for the tenants, for the employees of the carriers who fetch goods from or deliver goods to tenants, for the employees of tenants and the freight which is always in the custody of employees of carriers—brought to and shipped out by the tenants, and, in general, said employees, in fact, confine their activities to the performance of said duties" (R. 328).

The building makes no repairs or alterations in leased premises except where it agrees to do so as a condition of signing or renewing a lease in order to adapt the leased premises to the requirements of the lease, and usually this work is done by outside contractors hired for such purpose. It is not the duty of the employees of the Arsenal Building to perform any work in the leased premises, except where it is necessary to do so for the general safety and preservation of the building, and the Arsenal Building employees so limit their activities, except occasionally when some of them do favors on their own time for tenants, for which the tenant tips them.

The Arsenal Building employees are compensated at rates in excess of those set forth in Section 6 of the Fair Labor Standards Act of 1938, but they are employed a number of hours weekly in excess of those set forth in Section 7 of that Act, and are not compensated for all such excess hours at the rate of time and one-half.

Questions Submitted for Review

9. In the light of the foregoing, your petitioners now desire to submit to this Court for review the following questions:

(a) Whether the Fair Labor Standards Act of 1938 is applicable to your petitioners and to the building service employees of the Arsenal Building.

(b) Whether said Act is applicable to your petitioners who are not themselves in any way engaged in interstate commerce or in the production of goods for interstate commerce, as such terms are defined by said Act.

(c) Whether the building service employees of the Arsenal Building are engaged in the production of goods for interstate commerce, or in processes or occupations necessary thereto, within the meaning of said Act.

(d) Whether your petitioners and the employees of the Arsenal Building are exempted from the application of said Act as service establishments by reason of the provisions of Section 13 (a) (2) thereof.

(e) Whether said Act, if applicable to your petitioners and to the employees of the Arsenal Building is unconstitutional and void for lack of Congressional power.

Reasons in Support of Petition

10. Your petitioners submit in support of their within petition the following reasons and arguments:

(a) The questions involved in this case are of widespread public interest, and of supreme importance to

many thousands of real estate owners and their service employees. The decision of the Court below, if upheld, will involve radical changes in the line of demarcation between Federal and State power, and a radical change in the present methods of doing business. It would bring under Federal jurisdiction the servicing of real estate by local owners where, through lease or otherwise, such real estate housed in part tenants producing goods for interstate commerce.

(b) Prevailing ideas, customs and practices among both employers and employees herein involved have been to the effect that the employees are all engaged in intrastate commerce, and not in producing goods for interstate commerce. This is borne out by a collective bargaining agreement entered into between two associations of employers, of one of which the Arsenal Building Corporation was and is a member, and Building Service Employees International Union, Local 32B, A. F. of L., made some eight months after the Fair Labor Standards Act was enacted, and over three months after it took effect, providing for total weekly earnings to be paid for a 47-hour week, and further by an arbitration award made over two years after the enactment of the law, providing for gross weekly earnings for a 46-hour week. Thus, the parties and the arbitrator confirmed the general customs, practices and prevailing thought in this industry that the Fair Labor Standards Act has no application.

(c) As pointed out in the opinion of the United States Circuit Court of Appeals for the Second Circuit, the decisions of state courts of last resort and Federal district courts are divided on this subject. The opinion in this case, moreover, clearly indicates a lack of conviction upon the part of the Court, for it is stated:

"Obviously the question will not be set at rest until the Supreme Court makes an authoritative ruling."

(d) The decision of the United States Circuit Court of Appeals for the Second Circuit to the effect that the building service employees of the Arsenal Building are producing goods for interstate commerce within the meaning of the Act is clearly erroneous. None of the building service employees ordinarily enters the demised premises of the tenant-manufacturers. For example, the elevator operators, who constitute a majority of the employees involved, at no time cross the threshold of the manufacturers' domain; they merely operate elevators which outsiders use to bring raw materials into the manufacturing premises before any work of production begins. After the manufacturing is completed the elevators are used to transport the finished products. The elevator operators do not touch or deliver either the raw materials or the finished product. They are no more a part of production than the public truckman who waits at the curb in the street below to deliver raw materials or to receive finished goods.

More particularly, the Court below was in error in that

(1) It held that it was immaterial that neither of your petitioners was itself engaged in interstate commerce or in the production of goods for interstate commerce.

(2) It held that the employees of the Arsenal Building were engaged in the production of goods for interstate commerce or in processes or occupations necessary to such production.

(3) It failed to hold that the employees of the Arsenal Building were not engaged in interstate commerce within the meaning of the Act.

(4) It held that neither your petitioners nor the employees of the Arsenal Building were exempt from the application of the Act within the meaning of Section 13(a) (2) of the Act relating to retail and service establishments.

(5) It failed to hold that the Act, if applied to your petitioners and to the employees of the Arsenal Building, is unconstitutional and void for lack of congressional power.

(e) The Court's attention is respectfully directed to the fact that the case of *I. B. Kirschbaum Company* v. *Philip B. Fleming*, referred to in the opinion of the court below, is now pending upon petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit and that there are differences in the opinions rendered therein and in this case, as well as in the facts upon which said opinions are based.

(f) The case involves, and the United States Circuit Court of Appeals for the Second Circuit has decided, important questions as to the interpretation and administration of the Fair Labor Standards Act of 1938 which have not been, but should be, decided by this Court. The public interest, therefore, will be promoted by the prompt settlement in this Court of such questions.

Conclusion

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record and all proceedings in the

within cause and to stand to and abide by such order and direction as to your Honors shall seem meet, and the circumstances of the case require, and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem proper.

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Dated: February 5, 1942.